No. 12-417

IN THE

Supreme Court of the United States

CLIFTON SANDIFER, *et al.*,
Petitioners,

v.

UNITED STATES STEEL CORPORATION,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF GROCERY MANUFACTURERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

KARIN F.R. MOORE
GROCERY MANUFACTURERS ASSOCIATION
1350 I Street, Suite 300
Washington, D.C. 20005

TAMMY D. MCCUTCHEN
Counsel of Record
WILLIAM F. ALLEN
STEVEN E. KAPLAN
SHERRON T. MCCLAIN
LITTLER MENDELSON, P.C.
1150 17th Street, N.W.
Suite 900
Washington D.C. 20036
(202) 414-6857
TMcCutchen@littler.com

Counsel for Amicus Curiae

July 26, 2013

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 12-417

CLIFTON SANDIFER, *et al.*,
Petitioners,

v.

UNITED STATES STEEL CORPORATION,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF GROCERY MANUFACTURERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

INTEREST OF THE *AMICUS CURIAE* [1]

The Grocery Manufacturers Association ("GMA") is the largest association of food, beverage, and consumer product companies in the world. Its members

[1] No party's counsel authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Petitioners filed a blanket consent to the filing of *amicus curiae* briefs in support of either or neither party with the Clerk of the Court. An email from Respondents consenting to the filing of this *amicus curiae* brief also has been filed with the Clerk of Court.

employ more than 2.5 million workers in all fifty states, with sales in the United States totaling over $300 billion annually. GMA leads efforts to increase growth and productivity in the food and beverage industry, and also works to promote the safety and security of the Nation's food supply. GMA has been an active advocate for leading food, beverage and consumer product companies in the United States since 1908, applying the accumulated scientific and legal expertise of its member companies to vital public policy issues affecting the industry.

GMA and its members have a significant interest in the question presented in this case. Employees who work the production lines in the food and beverage industry are required by law or their employers to wear work clothes designed both to protect food safety and to protect employees from workplace injuries. The protective clothing worn by employees working on a food or beverage production line is less cumbersome than in the steel industry. Employees of GMA members may be required – for their own safety or to protect food safety – to wear hairnets, bump caps, ear protection, safety glasses, mouth guards, gloves, jackets, smocks, aprons and safety boots. Relying on Section 3(o) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(o) ("Section 3(o)"), some GMA members have negotiated with the unions representing their employees regarding compensation for donning and doffing such gear. Reversal of the Seventh Circuit's decision would throw the validity of such agreements, and similar long-standing customs or practices, into doubt. The class action litigation and retroactive liability that would follow could be devastating to many employers in the industry. Even assuming only ten minutes of unpaid time per day (50 minutes for a five-day work week), liability per

employee could easily reach $1,578.66 – or $1,578,660 per 1,000 employees in an industry that employs millions.[2]

SUMMARY OF ARGUMENT

Section 3(o) of the FLSA allows unions and employers to bargain collectively regarding compensation for "any time spent in changing clothes or washing at the beginning or end of each workday." 29 U.S.C. § 203(o). The term "clothes" in this section is broad and unqualified. The context of the term – the activity of donning and doffing clothes in the workplace at the beginning and end of the work day – supports a broad and unqualified interpretation. The purpose of Section 3(o) is to leave the compensability of such clothes-changing time to collective bargaining, and only a broad interpretation of the term "clothes" can effectuate that purpose.

Yet, Petitioners ask the Court to re-write Section 3(o) by imposing new limitations on the types of

---

[2] This potential liability was calculated as follows: $12.68 per hour x 1.5 x 0.83 hours = $15.79 per employee, per week x 50 workweeks = $789.33 per year x 2 years = $1,578.66 per employee. *See* Bureau of Labor Statistics, *May 2012 National Occupational Employment and Wage Estimates, United States, Occupation #51-3000: Food Processing Workers,* available at http://www.bls.gov/oes/current/oes_nat.htm#51-0000 (last visited on July 8, 2013) (median hourly wage of food processing workers). This calculation assumes that the U.S. Department of Labor and federal courts would find that employers acted in good faith reliance on Section 3(o) and did not act willfully. Thus, the calculation does not include the additional remedies available under the FLSA of a third year of back wages or liquidated damages. Including these additional remedies would result in liability of $4,735.98 per employee.

clothing that can be the subject of collective bargaining. Petitioners contend that the term "clothes" should be interpreted to exclude items that, unlike ordinary clothing, are used to protect employees against workplace hazards and were designed to provide such protection.

Petitioners' proposed interpretation is contrary to the text and context of Section 3(o). A narrow interpretation of Section 3(o) also is unsupported by contemporaneous usage of the term "clothes" in dictionaries and court decisions. Finally, nothing in the legislative history indicates that Congress intended Section 3(o) to exclude any of the various items that employees are required to wear in order to perform their jobs.

It is important to reflect on what Section 3(o) does not do: Section 3(o) does not deprive employees of coverage under the FLSA. Section 3(o) does not exempt employees from the minimum wage and overtime requirements in the FLSA. Section 3(o) does not deprive any employee of any substantive rights under the FLSA.

Rather, Section 3(o) allows a union to negotiate with employers regarding whether, when and how much employees will be compensated for the time they spend changing clothes. This is an additional substantive right not enjoyed in non-union workplaces. Employees covered by collective bargaining agreements ("CBAs") may choose to forego pay for the 5, 10 or 15 minutes a day they spend donning and doffing work clothes in exchange for higher hourly wages or decreased health insurance premiums. Employees who do not belong to unions have no choice – even if an increased hourly wage would net higher compensation than being paid for time spent changing clothes.

In the guise of "narrowly construing" limitations "on the scope and the rights established by the FLSA," Pet. Br. at 51, Petitioners ask the Court to deprive employees of their right to bargain collectively regarding pay for time spent changing clothes.

Further, having already received the benefit of their bargain, Petitioners ask the Court to set aside and ignore over 65 years of practice under bona fide collective bargaining agreements and impose substantial retroactive liability on U.S. Steel. The CBAs between U.S. Steel and the United Steelworkers union have provided that the company would not compensate employees for clothes-changing time *since 1947* – two years *before* the 1949 enactment of Section 3(o). This case seems to be the very situation that Congress enacted Section 3(o) to avoid.

We urge the Court to reject Petitioners' plea to narrowly construe Section 3(o) as unsupported by the statutory text, context and purpose, contemporaneous usage or legislative history. Instead, the term "clothes" should be interpreted as written, intended and necessary to effectuate the purpose of Section 3(o): broadly, without modification or limitation, to prevent federal courts or the DOL from overriding carefully negotiated collective bargaining agreements and imposing significant retroactive liability on employers.

ARGUMENT

I. THE TERM "CLOTHES" IN SECTION 3(o) IS BROAD AND UNQUALIFIED

Section 3(o) of the FLSA allows employees and employers to bargain collectively regarding compensation for "any time spent in changing clothes or washing at the beginning or end of each workday." 29 U.S.C.

§ 203(o). The term "clothes" in this section stands unmodified, without qualifiers. The statutory text does not limit the term "clothes" by function, form, composition or the place where the item is worn on the body.

Yet, Petitioners ask the Court to re-write Section 3(o) by imposing new qualifications and limitations that do not appear in the text. Petitioners contend that the term "clothes" in Section 3(o) "should be interpreted to exclude items that, unlike ordinary clothing, both are used to protect employees against workplace hazards and were designed to provide such protection." Pet. Br. at 43.

A closer study of Petitioners' brief reveals that they would have this Court exclude all of the following items from the broad term "clothes":

- Hardhats (Pet. Br. at 7);
- Safety glasses (Pet. Br. at 7);
- Earplugs (Pet. Br. at 7);
- Respirators (Pet. Br. at 7);
- Flame retardant hoods (Pet. Br. at 7);
- Flame retardant jackets (Pet. Br. at 7);
- Flame retardant pants (Pet. Br. at 7);
- Wristlets (Pet. Br. at 7);
- Work gloves (Pet. Br. at 7);
- Leggings (Pet. Br. at 7);
- Steel-toed boots (Pet. Br. at 7);
- Knife scabbards (Pet. Br. at 16);
- Items that cover only areas usually covered by ordinary clothing (Pet. Br. at 19);

- Items worn on the extremities (Pet. Br. at 19);
- Items made of hardened plastic (Pet. Br. at 20);
- Items made of rubber (Pet. Br. at 20);
- Items made of leather (Pet. Br. at 20);
- Items made of metal (Pet. Br. at 20);
- Items made of a combination of metal and other materials (Pet. Br. at 20);
- Items made of heavy material (Pet. Br. at 20);
- Items infused with chemicals (Pet. Br. at 20);
- Items intended to protect the wearer from injury or death (Pet. Br. at 20);
- Items worn over street clothes (Pet. Br. at 22);
- Aprons (Pet. Br. at 26);
- Overalls (Pet. Br. at 26);
- Bulletproof vests (Pet. Br. at 36);
- Flak jackets (Pet. Br. at 36);
- Bulletproof pants (Pet. Br. at 36);
- Radiation-proof lead lined underpants (Pet. Br. at 36-37);
- Airbag vests and jackets worn by equestrians (Pet. Br. at 37);
- Items designed and used to protect the wearer from hazards such as bullets, spinal fractures, burn scarring or molten metal (Pet. Br. at 38);
- Medieval chain mail armor (Pet. Br. at 41);
- Hair and beard nets (Pet. Br. at 41);
- Jump suits (Pet. Br. at 41);

- Space suits (Pet. Br. at 41);
- Plastic sleeves (Pet. Br. at 41);
- Sleeves unconnected to a shirt or blouse (Pet. Br. at 41);
- Steel mesh gloves (Pet. Br. at 41);
- Lead pants (Pet. Br. at 41);
- Any item not considered ordinary apparel (Pet. Br. at 44); and
- Any item that employers are required to provide employees under OSHA's personal protective equipment regulations (Pet. Br. at 57).

Thus, Petitioners would re-write Section 3(o) as follows:

> **(o) Hours Worked**.— In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing <u>ordinary</u> clothes <u>made of ordinary cloth, that are not worn over street clothes and cover only areas usually covered by street clothes, and that are not used or designed to protect employees from workplace hazards, injury or death,</u> or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

Work clothes serve many different purposes. Work clothes can protect consumer food products from contamination. *See McComb v. C.A. Swanson & Sons, D.C.*, 77 F. Supp. 716, 720 (D. Neb. 1948). Work

clothes keep employees' street clothes free from "grime," "dirt," and "smears of ink" that would have otherwise ruined their personal clothing. *Mitchell v. Southeastern Carbon Paper Co.*, 124 F. Supp. 525, 525 (D. Ga. 1954), *aff'd* 228 F.2d 934 (5th Cir. 1955). Work clothes also serve as a means of identification. *Battery Workers' Union Local 113, United Elec., Radio & Mach. Workers v. Elec. Storage Battery Co.*, 78 F. Supp. 947, 948-50 (D. Pa. 1947). Finally, work clothes have long protected workers from workplace hazards. *Steiner v. Mitchell*, 350 U.S. 247, 250-51 (1956); *Ciemnoczolowski v. The Q.O. Ordnance Corp.*, 228 F.2d 929, 931-32 (8th Cir. 1955); *Laudenslager v. Globe-Union, Inc.*, 180 F. Supp. 810, 813 (D. Pa. 1958).

Congress could have added qualifying and limiting adjectives to Section 3(o), but it did not. Nothing in the text of the statute indicates in any way that the bare and broad term "clothes" includes only "ordinary apparel" that is not used or designed to protect employees against workplace hazards. Section 3(o) uses the term "clothes" – not "ordinary clothes," "clothes made of ordinary cloth," or "nonprotective clothes." *See Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 215 (4th Cir. 2009) (the statute does not use such qualifying adjectives as "ordinary clothes," "street clothes," or "nonprotective clothes").

Limiting the definition of "clothes" to "ordinary" clothing would leave Section 3(o) an empty and meaningless shell. The donning and doffing of ordinary clothing in the workplace – which generally would not be required either by law or the employer – is not compensable under the Portal-to-Portal Act. 29 U.S.C. § 254(a). Donning and doffing only becomes a compensable "principal activity" when an employee must change into specialized, protective clothes

necessary to perform the work. *Steiner*, 350 U.S. at 256. Congress could not have intended Section 3(o) to cover only ordinary clothing when donning and doffing such clothing was already non-compensable under the Portal-to-Portal Act.

II. CONTEMPORANEOUS USAGE OF THE TERM "CLOTHES" SUPPORTS A BROAD INTERPRETATION

When a statutory term is undefined, it is normally construed "in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)). "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). Thus, the first task is to look at the ordinary meaning of the term "clothes" at the time Congress enacted Section 3(o) in 1949.[3] *Perrin*, 444 U.S. at 42. Neither dictionary definitions nor court decisions published contemporaneously with Section 3(o) support Petitioners' view that the term "clothes" was narrowly understood in 1949 to exclude clothes used for a protective purpose.

A. Contemporaneous Dictionary Definitions

Contemporaneous dictionaries defined the term "clothes" broadly. The 1949 edition of Funk & Wagnalls Standard Dictionary defined "clothes" as

[3] Petitioners argue that "patterns of current usage" support a distinction between "protective items" and "clothes," Pet. Br. at 43, but such patterns are irrelevant to determining the ordinary meaning of "clothes" when Section 3(o) was enacted.

"the various articles of raiment worn by human beings; garments collectively." Funk & Wagnalls Standard Dictionary of the English Language 505 (1949). "Raiment" was defined as "wearing apparel; clothing." *Id*. at 2044. In turn, "apparel" was defined as "the things collectively with which one is clad, or which one wears as clothing, esp. the outer garments; raiment; garb." *Id*. at 134. "Clothing" was defined as "dress in general; garments; raiment; apparel." *Id*. at 505; *see also* Webster's New International Dictionary 507 (2nd ed. 1948) ("clothes" defined as "covering for the human body").

These definitions have a central theme: "clothes" are articles "worn by human beings" and "with which one is clad." The definitions do not limit the meaning of the term "clothes" to ordinary apparel or street clothes, made of ordinary cloth, that are not used to protect employees from injury.

Petitioners rely upon the 1948 Webster's New International Dictionary of the English Language, which defined "clothes" as "covering for the human body; dress; vestments; vesture; a general term for whatever covering is worn, or is made to be worn, for decency or comfort." Pet. Br. at 33 (citing Webster's Second New Int'l Dictionary 507 (1948)). Petitioners argue, based on this definition, that only items with a "primary purpose" to assure comfort or decency qualify as clothing. Pet. Br. at 16. Petitioners also contend: "If the primary purpose of a particular item is not to provide 'decency or comfort,' it is *less likely* to be referred to as clothes." Pet. Br. at 34 (emphasis added). Petitioners' use of the phrase "less likely" is an interesting hedge – necessary to avoid a conflict between their reading of the 1948 Webster's definition and their argument that Congress intended Section

3(o) only to cover clothes like those worn in 1949 by bakery workers. Petitioners state: "Representative Herter, the original proponent of the proposal that became section 203(o), specifically pointed to the clothes-changing of bakery workers as the paradigm to which his legislation was addressed." Pet. Br. at 46. However, Petitioners also concede that the purpose of "work clothes" in the bakery industry was to "assure the safety of food." *Id.; see also* Pet. Br. at 45 (mid-twentieth century workers "changed clothes at the beginning and end of the day because the work environment was dirty," and their work clothes would be "filthy"). Thus, under Petitioners' reading of the Webster's definition, items worn by bakery workers in 1949 would not be "clothes" because the primary purpose of wearing the items was food safety – not "decency or comfort."

A better reading of the 1948 Webster's definition is that clothes are "covering for the human body" which includes but is not limited to coverings worn for "decency or comfort." Examples abound of "ordinary apparel" worn on the street that is neither "decent" nor "comfortable." All clothes have multiple functions. All clothes (then and now) have a protective function: "Protection – against sun, cold, wind, blisters, stains, insect bites, and being spotted by animals that one is hunting – is a common function of clothing, and an especially common function of work clothes worn by factory workers." *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 594 (7th Cir. 2012). Motorcycle riders wear leather pants for comfort, decency *and* protection from injury, but Petitioners would exclude this common type of clothing from the meaning of the term "clothes"

in Section 3(o). Pet. Br. at 20 (excluding items made of leather).[4]

B. Contemporaneous Court Decisions

A review of contemporaneous court decisions, from shortly before and after the enactment of Section 3(o), demonstrates that courts had considered a wide variety of protective clothing in many industries, both in the context of determining whether donning and doffing was compensable work time and in applying Section 3(o). *See, e.g.*, *Steiner*, 350 U.S. at 247 (protective clothing in a toxic battery plant); *Bumpus v. Remington Arms Co.*, 183 F.2d 507 (8th Cir. 1950) (protective clothing in a manufacturing plant); *Newsom v. E.I. Du Pont De Nemours & Co.*, 173 F.2d 856, 857 (6th Cir. 1949) (aprons, overalls and shirts); *McComb*, 77 F. Supp. at 720-21, 723 (aprons, frocks, coveralls with buttons down the front, trousers, hairnets and rubber boots); *Battery Workers' Union*, 78 F. Supp. at 947 (guard uniforms); *McIntyre v. Joseph E. Seagrams & Sons Co., Inc.*, 72 F. Supp. 366, 370 (D. Ky. 1947) (one-piece garment referred to as a coverall or uniform, cap, and safety shoes).

---

[4] Petitioners contend that personal safety equipment was "relatively uncommon" when Section 3(o) was adopted and, as an example, state that the hard hat "did not come into widespread use until the 1960s." Pet. Br. at 46-47. However, the website cited by Petitioners states only that thermoplastics replaced fiberglass in hard hats in the 1950s and 1960s. In discussing the history of the hard hat, the website Bullard, *History of the Hard Hat*, http://ww.bullard.com/V3/products/head_face/head_protection/Hard_Hat_History/ (last visited July 8, 2013) explains that: The "hard boiled hat" was patented in 1919; hard hat areas existed as early as during the construction of the Golden Gate Bridge (which was completed in April 1937); the first aluminum hard hat was designed and manufactured in 1938; and, heat-resistant fiberglass hard hats were developed in the 1940s. *Id.*

None of these cases distinguished between clothes that protect employees from workplace hazards and clothes with some other function, and most involved clothes that Petitioners would exclude from Section 3(o). *See e.g.*, Pet. Br. at 7 (boots and hats); *id*. at 26 (aprons, overalls); *id*. at 41 (hairnets).

McComb, a case decided in 1948, is illustrative of a work environment where employees donned durable protective clothing designed to be worn at work only. In this case, poultry and dairy employees wore uniforms that were "made from fairly heavy tough materials" and the employer prohibited employees from wearing any other work clothes that were "privately designed." *McComb*, 77 F. Supp. at 720-21; *see also* Pet. Br. at 20 (items made of heavy materials should be excluded from Section 3(o)). Federal law required the wearing of "aprons, frocks and other outer clothing worn by persons who handled any product" to prevent the product from becoming contaminated by perspiration, hair, or cosmetics. *McComb*, 77 F. Supp. at 720-21. The court described the clothing worn by the employees in some detail. Male employees wore "coverall[s] with buttons down the front" and female employees either wore a "bungalow apron designed without buttons and to be slipped on and removed over the head" or a "covering garment, buttoned down the front and coatlike in design." *Id*. In addition, the employer required female employees to wear "hairnets" for "*safety* and sanitary" reasons and it required male employees to wear "rubber boots" if they were frequently working on wet surfaces for "*health* and security" reasons. *Id*. (emphasis added).

The Supreme Court's 1956 decision in *Steiner v. Mitchell* also did not distinguish between protective

and non-protective clothing. In *Steiner*, the Court agreed with the Secretary of Labor that battery plant employees working in a dangerous work environment were entitled to compensation under the FLSA for donning and doffing required clothing items on the employer's premises. *Steiner*, 350 U.S. at 256. The Court emphasized the significant health hazards associated with working in the plant, explaining that the employees customarily worked "with or near the various chemicals used in the plant," including "lead metal, lead oxide, lead sulphate, lead peroxide, and sulphuric acid." *Id.* at 249. The toxic lead chemicals attached themselves to the clothing, skin, and hair of the employees, and the sulphuric acid not only caused severe burns but also caused clothing to disintegrate or rapidly deteriorate on contact. *Id.* at 250. The Court noted that safe operation required the removal of clothing at the end of the shift, hence state laws mandating on-site changing facilities. *Id.*

Against this factual background, the Court explained that "activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the FLSA if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed." *Id.* at 256. The Court concluded "it would be difficult to conjure up an instance where changing clothes and showering are more clearly an integral and indispensable part of the principal activity of employment than in the case of these employees." *Id.*

Although Section 3(o) was not directly at issue in *Steiner*, the Court found the DOL's position (that changing into the protective clothing was compensable) "strengthened by [Section 3(o)] since its clear

implication is that clothes changing and washing, which are otherwise a part of the principal activity, may be expressly excluded from coverage by agreement." *Id.* at 254-55. It seems unlikely that the Court would have reached this conclusion if the term "clothes" in Section 3(o) excluded the type of protective clothes at issue in the case.

In 1954, a district court held that changing clothes to protect employees from grime, dirt, perspiration, and smears of ink was not integral to the employees' principal activity and not compensable because employees were changing for their own convenience. *Mitchell*, 124 F. Supp. at 526. Although unnecessary to the holding and thus *dicta*, the court additionally found that Section 3(o) also would bar relief because the employer did not have a custom or practice of paying for this time. *Id.* at 529. The Fifth Circuit affirmed the lower court's holding, and explained that the district court's reliance on Section 3(o) was unnecessary. Nonetheless, the Fifth Circuit did not dispute that changing into protective clothing would be subject to Section 3(o). *Mitchell v. Southeastern Carbon Paper Co.*, 228 F.2d 934, 937, 939 (5th Cir. 1955).

In 1955, the Eighth Circuit addressed whether clothes-changing time by production line operators was compensable under the Portal-to-Portal Act and Section 3(o). There, the workers were engaged in melting, pouring, and processing explosives and were required to change their clothes and take a shower after their shift. *Ciemnoczolowski*, 228 F.2d at 931-32. The clothing was undisputedly protective in nature. The employees were "required to change their clothes as a safety precaution against explosion which might be caused by sparks from metallic objects on or in

conventional clothing." *Id.* The Eighth Circuit found that the clothes-changing and washing time was preliminary and thus not compensable, which meant that reaching the Section 3(o) issue was unnecessary. However, like *Steiner* and *Mitchell*, the court indicated that the clothes-changing time would also be noncompensable under Section 3(o). The protective clothing at issue, by implication, fell within the Section 3(o) exclusion and "no contract or custom or practice to pay for such had been shown." *Id.* at 932-34.

In the 1958 *Laudenslager* decision, the employees were exposed to lead and acid in varying degrees. The union and employer bargained for employees to be paid 24 minutes per day for changing into protective clothing and washing. 180 F. Supp. at 812-13. Nonetheless, three employees sued claiming that the 24 minutes did not fully compensate them for that time. The court rejected their argument and held that, even if there was "excess [compensable] time," Section 3(o) barred relief. *Id*.

In 1962, a district court found that changing into coveralls, aprons, gloves, goggles, and hoods was governed by Section 3(o) "where such time is the subject of a collective bargaining agreement or is excluded by custom or practice under such an agreement." *Nardone v. Gen. Motors, Inc.*, 207 F. Supp. 336, 339-40 (D.N.J. 1962).

These cases demonstrate that, from the earliest interpretations of the statutory language, the "ordinary or natural meaning" of the term "clothes" within the context of a work environment includes all types of gear that employees were required to wear in order to perform their jobs. The courts considered, *inter alia*, frocks, jackets, coveralls, aprons, hairnets, boots, gloves, goggles, hoods and other clothes

designed to protect employees from lead, acid, chemicals and explosives – all of which Petitioners claim have never been covered by Section 3(o). But none of the courts distinguished between protective and non-protective clothing. Congress intended Section 3(o) to include all types of clothing that protects employees from workplace hazards.

III. THE PURPOSE OF SECTION 3(o), AS REVEALED BY ITS LANGUAGE AND LEGISLATIVE HISTORY, SUPPORTS A BROAD INTERPRETATION OF THE TERM "CLOTHES"

The history of the Fair Labor Standards Act, as enacted in 1938, and the subsequent early amendments to the FLSA, provide further context for discerning the purpose of Section 3(o) and, thus, the meaning of the term "clothes." The FLSA requires employers to pay employees at least the minimum wage for all hours worked and to pay overtime for hours over 40 in a workweek. Despite the importance of the concept of "work," Congress did not define that term in the FLSA. Federal courts were required to fill the gap. In 1944, the Supreme Court broadly defined "work" as physical or mental acts, whether burdensome or not, controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer. *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944); *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). In 1946, the Supreme Court held that "the statutory workweek" included "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946).

These broad definitions of "work" surprised many, including employers, who faced a flood of FLSA litigation following the *Mt. Clemens* decision. "By some reports, claims totaling a billion dollars on behalf of industrial employers were filed by the end of 1946." *Sepulveda*, 591 F.3d at 217-18 (quotations and citation omitted).

Finding the judicial definitions at odds with "long-established customs, practices, and contracts between employers and employees" and so expansive they created "wholly unexpected liabilities, immense in amount and retroactive in operation," Congress passed the Portal-to-Portal Act in 1947. 29 U.S.C. § 251(a). The Portal-to-Portal Act amended the FLSA to narrow the judicial definition of "work" by excluding two categories of activities:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities the employee is employed to perform; and
>
> (2) activities that are preliminary or postliminary to the principal activity or activities, which occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he or she ceases, such principal activity or activities.

Id. § 254(a). Although the Portal-to-Portal Act answered important questions regarding time spent traveling to and from work, Congress left many questions unanswered by failing to define the terms "principal," "preliminary" and "postliminary" activities.

One of the unanswered questions was whether employees must be paid for time spent donning and

doffing work clothes: Is donning and doffing a preliminary and postliminary activity and thus noncompensable? Or, should it be considered part of an employee's "principal activity" for which he must be paid?

At least in the Senate, this issue was discussed during debates on the Portal-to-Portal Act. Senator Cooper, a sponsor of the Portal-to-Portal Act, responding to a question from Senator McGrath, concluded: "if the employee could not perform his activity without putting on certain clothes, then the time used in changing into those clothes would be compensable as part of his principal activity." 93 Cong. Rec. 2297-98 (daily ed. March 20, 1947). The colloquy between Senator Cooper and Senator McGrath follows in its entirety:

Senator McGrath questions:

> In certain of our chemical plants workers are required to put on *special clothing* and to take off their clothing at the end of the workday, and in some of the plants they are required to take shower baths before they leave. Does the Senator regard such activity as that as coming within the compensable workday?

Id. (emphasis added).

Senator Cooper responds:

> I am very happy that the Senator has asked the question, because I believe it gives the opportunity of drawing a fine distinction between the type of activity which we consider compensable and the type which should not be compensable. In accordance with our intention as to the definition of 'principal activity,' if the employee could not

> perform his activity without putting on certain clothes, then the time used in changing into those clothes would be compensable as part of his principal activity. On the other hand, if changing clothes were merely a convenience to the employee and not directly related to the specific work, it would not be considered a part of his principal activity, and it follows that such time would not be compensable.

Id.

Despite Congress' efforts, litigation and DOL investigations regarding whether and how much employees should be paid for time spent donning and doffing protective clothing continued unabated. *See, e.g., Steiner*, 350 U.S. at 247; *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005).

Two years later, in 1949, Congress again acted to curb unexpected retroactive FLSA liability – this time, liability confronting employers whose workers were covered by CBAs – by enacting Section 3(o). *See Sepulveda*, 591 F.3d at 217 ("Congress continued its effort to restore sanctity to private agreements by adding Section 203(o) to the FLSA."); *Anderson v. Cagle's Inc.*, 488 F.3d 945, 958 (11th Cir. 2007) ("Congress's efforts to curtail employee-protective interpretations of the FLSA continued when the FLSA was amended two years later to add, among other things, what would become § 203(o).").

Representative Herter, the sponsor of the bill that became Section 3(o), offered the amendment for the "purpose of avoiding another series of incidents which led to the portal-to-portal legislation and led to the overtime-on-overtime legislation." 95 Cong. Rec. H11,210 (daily ed. Aug. 10, 1949). Representative

Herter's concern was that the DOL would override a carefully negotiated collective bargaining agreement between a union and an employer concerning how much compensable time to allocate to changing clothes and washing. He observed:

> At the present moment there is a twilight zone in the determinations of what constitutes hours of work which have been spelled out in many collective bargaining agreements but have not necessarily been defined in the same ways.
>
> Let me be specific. In the bakery industry, for instance, which is 75 percent organized, there are collective-bargaining agreements with various unions in different sections of the country which define exactly what is to constitute a working day and what is not to constitute a working day. In some of those collective-bargaining agreements the time taken to change clothes and to take off clothes at the end of the day is considered a part of the working day. In other collective-bargaining agreements it is not so considered. But, in either case the matter has been carefully threshed out between the employer and the employee and apparently both are completely satisfied with respect to their bargaining agreements.
>
> The difficulty, however, is that suddenly some representative of the Department of Labor may step into one of those industries and say, "You have reached a collective-bargaining agreement which we do not approve. Hence the employer must pay for back years the time which everybody had considered was excluded as a part of the working day. That situation may arise at any moment. This amendment is offered merely to

> prevent such a situation arising and to give sanctity once again to the collective-bargaining agreements as being a determining factor in finally adjudicating that type of arrangement. It sounds wordy, but in effect it is a very simple amendment.

Id. At the time, Section 3(o) was supported by both unions and management. *Id.*; *see also Mitchell*, 124 F. Supp. at 527-28 (Section 3(o) was enacted because "all members of Congress interested therein had in mind that such changing time and activities would not be part of the work-week if there was an agreement, custom, or understanding, excluding the same.").

This legislative history reveals that the purpose of Section 3(o) was to allow an employer and union to bargain collectively regarding compensation for time spent "changing clothes" and "washing" before and after work – without fear that the DOL or federal courts would invalidate the bargain and impose retroactive liability on the employer. That purpose is reflected in the text of Section 3(o), which excludes time spent changing clothes from compensable work time only "by the express terms of or by custom or practice under a bona fide collective bargaining agreement applicable to the particular employee." 29 U.S.C. § 203(o).

The facts in this case demonstrate the very situation that Section 3(o) was enacted to avoid: Since 1947, two years *before* the 1949 enactment of Section 3(o), the collective bargaining agreements between U.S. Steel and the United Steelworkers union have provided that the company would not compensate employees for "time spent in preparatory and closing activities." Pet. Br. at 10-11. Most recently, in 2008, subsequent to the Petitioners filing this case, the Steelworkers confirmed the agreement in the CBA by adding more

specific language: The company would not compensate employees for time spent "donning and doffing protective clothing." *Id*.

Now, having received the benefit of their bargain, Petitioners ask the Court to set aside and ignore over 65 years of practice under a bona fide collective bargaining agreement and impose substantial retroactive liability on U.S. Steel.

By enacting Section 3(o), Congress intended that the issue regarding compensability of donning and doffing time be determined through collective bargaining between employer and employees, without interference from the DOL or the federal courts. A narrow definition of the term "clothes" which excludes countless items worn on the human body would again put every collective bargaining agreement at risk of being found invalid, thus defeating the purpose of Section 3(o) entirely. Congress left this field to collective bargaining. Only a broad interpretation of the term "clothes" can keep the issue as a matter of collective bargaining, rather than as a source of endless litigation requiring federal courts to determine, item by item, whether a piece of gear falls within the narrow and complicated definition of "clothes" proposed by Petitioners. A broad definition of "clothes" is necessary to effectuate the purpose of Section 3(o).

IV. OSHA REGULATIONS AND WAR LABOR BOARD DECISIONS HAVE NO BEARING ON THE MEANING OF THE TERM "CLOTHES"

Perhaps because of the lack of support in the text, context and purpose of Section 3(o), Petitioners have scavenged for obscure and inapposite sources to

support its complicated definition of "clothes." Petitioners rely on regulations issued under the Occupational Safety and Health Act of 1970 ("OSHA") (Pet. Br. at 57-60), decisions from the obscure War Labor Board (*Id.* at 25-26), and a 1995 publication regarding the art of dress in England and France from 1750 to 1820 (*Id.* at 34). The fact that Petitioners had to turn to such sources itself demonstrates that their proposed definition of "clothes" was *not* in common usage when Section 3(o) was enacted in 1949.

A. OSHA Regulations

Petitioners invite the Court to graft OSHA's personal protective equipment (PPE) regulations into Section 3(o), contending that the regulations "provide an already established body of law that distinguishes such protective equipment from ordinary clothing." Pet. Br. at 44; *see also id*. at 57-60. OSHA regulations are not an appropriate source for discerning the meaning of the term "clothes" in Section 3(o) of the FLSA.

First, the regulations are not contemporaneous with the enactment of Section 3(o). Congress enacted Section 3(o) in 1949. OSHA was not enacted until 1970. Moreover, Section 3(o) was enacted by Congress, and the OSHA regulations were promulgated by the Department of Labor.

Second, the OSHA regulations have a different purpose than Section 3(o). The purpose of Section 3(o) is to allow employers and employees to collectively bargain regarding compensation for time spent changing clothes and washing, thus preventing the DOL and courts from invalidating collective bargaining agreements and existing practices. The purpose of the OSHA regulations is to identify types of "personal

protective equipment" that employers must provide to employees in order to "reduce employee exposure to hazards when engineering and administrative controls are not feasible or effective in reducing these exposures to acceptable levels." *See* Occupational Safety & Health Admin., *Personal Protective Equipment (PPE)*, available at https://www.osha.gov/SLTC/personalprotectiveequipment/index.html (last visited July 8, 2013) (OSHA website on personal protective equipment).

Third, the OSHA regulations offer confusion, not clarity. Under the OSHA regulations, employers are not required to pay for "everyday clothing" such as "long-sleeve shirts, long pants, street shoes, and normal work boots." 29 C.F.R. § 1910.132(h)(4)(ii). Employers are also not required to pay for "ordinary clothing" which OSHA combines with "skin cream, or other items used *solely for protection from weather*." 29 C.F.R. § 1910.132(h)(4)(iii) (emphasis added). This category includes: "winter coats, jackets, gloves, parkas, rubber boots, hats, raincoats, ordinary sunglasses, and sunscreen." *Id.* Only such "everyday" or "ordinary" clothing, Petitioners argue, are "clothes" under Section 3(o). Applying this rule, the same type of clothing could be included or excluded from Section 3(o) in different workplace environments.

For example, if an outdoor employee, such as a delivery driver, wears a raincoat (or some other "jacket") and gloves on a rainy day, it would be "ordinary clothing" under OSHA and included in Petitioner's definition of "clothes" under Section 3(o). The *same* raincoat, jacket, and gloves offered to an indoor employee, such as a sanitation worker in a poultry processing plant, would not qualify as "ordinary clothing" (because not used solely for protection

from weather) and would be excluded from Petitioners' definition of "clothes" under Section 3(o). The same result would hold true for rubber boots – "ordinary clothing" in the plant yard (if weather-related), but not on the plant floor no matter how wet the job is. Even more confusing, a "normal work boot" is "everyday clothing" but a "rubber boot" is not, and if a steel plate is built into the toe of a work boot, it is no longer "everyday clothing," even if worn every day. The distinction between sunglasses (clothes) and safety glasses (not clothes) is equally untenable. They are physically identical objects (two lenses, a nose holder, and frames) and both may be used for comfort and protection (to avoid sun glare or dust in the eyes), yet only one would be subject to Section 3(o).[5]

Fourth, even if OSHA regulations are an appropriate source for discerning the meaning of the term "clothes" in Section 3(o) of the FLSA, OSHA itself recognizes that "personal protective equipment" includes "specialized *clothing* or equipment worn by an employee for protection against a hazard." 29 C.F.R. § 1910.1030(b) (emphasis added); *see Sepulveda*, 591 F.3d at 215 (citing OSHA regulation). In other words, even in OSHA's view, "personal protective equipment" can be either "clothing" or "equipment," depending on the article. Thus, turning to OSHA regulations would raise more questions than it would answer.[6]

---

[5] Petitioners' description, Pet. Br. at 8, of the special requirements of "laundering" the flame retardant jacket and pants worn by Respondent's employees – collectively referred to by Petitioners as "flame retardant *clothing*" and "flame retardant apparel" made of "a heavy fabric" – demonstrates that such items are "clothes" rather than "equipment".

[6] Petitioners' themselves acknowledge that the OSHA regulations would provide only a partial solution, stating that the

B. War Labor Board Decisions

Also unpersuasive is reliance by Petitioners and *amicus* AFL-CIO on four War Labor Board decisions issued in 1944 and 1945: *Big Four Meat Packing Cos.*, 21 War Labor Rep. 652 (1945); *Swift & Co.*, 21 War Labor Rep. 709 (1945); *John Morrell & Co.*, 21 War Labor Rep. 730 (1945); and *Continental Baking Co.*, 18 War Labor Rep. 470 (1944). *See* Pet. Br. at 25-26, 47-48; AFL-CIO Br. at 5-6, 8-9, 13-16. Petitioners and the AFL-CIO cite these decisions as evidence that the "common usage" of the term "clothing," of which Congress was aware when Section 3(o) was enacted in 1949, did not include items intended to protect employees from workplace hazards.

Congress dismantled the War Labor Board in 1946, one year before it enacted the Portal-to-Portal Act in 1947 and three years before it enacted Section 3(o) in 1949. There is no evidence in the legislative history that Congress considered, or was aware of, the War Labor Board decisions issued in 1944 and 1945. Nothing in the record indicates that findings by the War Labor Board were in "common usage."

The Portal-to-Portal Act and Section 3(o) were intended to modify judicial interpretations that Congress found to be in "disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation." 29 U.S.C. § 251(a). Thus, contrary to the assertions by Petitioners and the AFL-CIO, rather than embracing and agreeing with the War Labor

---

universe of protective clothing which they would exclude from Section 3(o) extends beyond that required by the OSHA regulations or the employer. Pet. Br. at 57, fn. 51.

Board decisions, it seems more likely that the decisions were just the sort of judicial overreach that Congress intended to correct by enacting the Portal-to-Portal Act and Section 3(o): Decisions disregarding long-established customs, practices and contracts between employers and employees – after all, there would have been no need for employees to litigate the issue if the employers had been paying for donning and doffing time. In fact, in *Continental Baking*, the Board rejected the baking company's argument that "time spent in changing to and from working clothes has never been regarded in the baking industry as constituting working time for which the employees should be remunerated." 18 War Labor. Rep. at 471.

Finally, even if the Court gives some weight to these decisions, they do not support a narrow definition of the term "clothes" in Section 3(o). Rather, the decisions characterize as "clothes" many items that Petitioners and AFL-CIO would exclude from Section 3(o) as "personal protective equipment." In *Big Four Meat Packing*, for example, the Board characterized work clothing as "outer working garments such as smocks, overalls, frocks, uniforms, boots, rubbers, leather aprons, raincoats, and gloves." 21 War Labor Rep. at 763. *See also John Morrell & Co.*, 21 War Labor Rep. at 733 (discussing "special purpose working garments"); *Swift & Co.*, 21 War Labor Rep. at 711 (same). But Petitioners would exclude all these items from the definition of clothing as "outer garments" put on over street clothes, not made of ordinary cloth, and designed to protect employees from workplace hazards. If this Court follows the reasoning of the War Labor Board, then items such as boots, gloves, aprons and smocks must be considered "clothes" under Section 3(o).

V. "CLOTHES" INCLUDE ANY ARTICLE THAT AN EMPLOYEE WEARS ON HIS OR HER PERSON TO BE READY TO WORK

"[W]ords are given meaning by their context, and context includes the purpose of the text." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012). Here, the meaning of the word "clothes" is best found by considering its context: A provision in the FLSA providing that employers and unions can bargain and reach agreement regarding the compensability of donning and doffing clothes in the workplace at the beginning and end of the work day. Petitioners focus too much on particular articles of clothing – on the words "changing" and "clothes," taken out of context. The focus of Section 3(o) is the *activity* of changing clothes and washing. In 1949, Representative Herter discussed the activity of changing clothes by bakery workers and existing collective bargaining agreements in the industry on the compensability of clothes-changing time. 95 Cong. Rec. H11,210 (daily ed. Aug. 10, 1949). The legislative history of Section 3(o) includes no discussion of what items bakery workers wore to work in 1949. The focus was never on the items worn, but, rather, the clothes changing activity itself.

By focusing on particular articles of clothing, Petitioners also seem to forget that the context of Section 3(o) is the workplace (not a shopping mall). A narrow definition that would exclude most items that employees must wear to perform their jobs is nonsensical given the workplace context of the FLSA and Section 3(o). As Judge Posner stated below: "Given the subject matter of the Fair *Labor* Standards Act it would be beyond odd to say that the word 'clothes' in

section 203(o) excludes work clothes, especially since the section is about changing into and out of clothes at the beginning and end of the workday." *Sandifer*, 678 F.3d at 594 (emphasis in original); *see also id.* at 595 ("Since workers very rarely change at work from street clothes to street clothes, section 203(o) would as we said be virtually empty if the Ninth Circuit was right.").

Further, a narrow definition would defeat the purpose of Section 3(o) to leave the issue of compensation for clothes-changing time to collective bargaining. If most work clothes are excluded from Section 3(o), as Petitioners contend, very little is left for bargaining. It seems that Petitioners would have the Court believe that collective bargaining is an undesirable forum for resolving the issue of compensation for clothes-changing time. However, Congress has long recognized the benefits of collective bargaining by enacting the National Labor Relations Act ("NLRA") in 1935. 29 U.S.C. §§ 151-169. The NLRA declares that the national commerce policy is to be carried out "by encouraging the practice and procedure of collective bargaining" and by protecting the right of employees to organize and designate representatives "for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." *Id*. § 151. Section 8(d) of the NLRA requires an employer and the employees' union to bargain in "good faith" over wages, hours, and other terms and conditions of employment. *Id*. § 158. Employers must negotiate over all health and safety issues (including the wearing of protective clothing) that affect the terms and conditions of employment. *See American Nat'l Can Co.*, 293 NLRB 901, 904 (1989). Employers must also bargain with unions over work hours,

including working overtime. *Kerry, Inc.*, 2012 NLRB LEXIS 558, *49 (2012).

Given that unions bargain over the issues of health, safety and work hours – and are more familiar than the DOL or federal courts with an employer's business and the employees they represent – unions are uniquely qualified to bargain over the compensability of donning and doffing work clothes, including protective clothing. In fact, it is sound policy to encourage unions and employers to bargain over the wearing of protective clothing, or any other safety issue, above and beyond the minimum requirements of federal or state law. During this bargaining, for example, a union may request or demand that an employer provide covered employees with clothes to protect them from workplace injury, even though such protective clothing is not required by law. If this clothing takes extra time to don and doff at the beginning and end of the workday, Section 3(o) allows employers and unions the freedom to also negotiate over the compensability of that time. If the employees want the employer to buy them the most expensive steel-toed boot on the market, through bargaining, they can agree to forego compensation for the few minutes they take to don and doff in exchange for the more expensive boots. Or, a union can trade off a few minutes of compensable time for a higher wage rate or some other benefit that is important to the employees it represents.

Section 3(o) gives employers and employees the right to bargain collectively regarding the compensability of clothes-changing time. On subjects of bargaining, "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate

the substantive solution of their differences." *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 489 (1960). Within this framework, the parties can separately "order their priorities" and then "trade off what is less important for what is more important to each side individually." *NLRB v. Cable Vision, Inc.*, 660 F.2d 1 (1st Cir. 1981).

By urging the Court to construe Section 3(o) narrowly,[7] Petitioners would take away the right of employers and employees to bargain collectively regarding compensation for clothes-changing time – apparently against the wishes of the Steelworkers union (Pet. Br. at 10-11). In addition, Petitioners' proposed definition also fails as unworkable. Petitioners propose that Section 3(o) exclude "items that, unlike ordinary clothing, both are used to protect employees against workplace hazards and were designed to provide such protection." Pet. Br. at 17. Under this general rule, Petitioners would exclude from Section 3(o): items made of any material other than ordinary cloth, Pet. Br. at 20; items infused with chemicals, *id.*; items worn over street clothes, *id.* at 22; items that cover only a portion of the body that would

[7] Courts and litigants have debated whether Section 3(o) is an "exemption" that should be construed narrowly or an "exclusion" to which the traditional adage of construing FLSA exemptions narrowly does not apply. *Compare Sandifer*, 678 F.3d at 595, *with Alvarez*, 339 F.3d at 905, *and* Pet. Br. at 51-56. But Section 3(o) is perhaps best viewed as creating a substantive right – the right to bargain collectively. An employee's right to bargain collectively regarding clothes-changing time, conferred by Section 3(o) of the FLSA, should be treated no differently than an employee's right to be paid the minimum wage and overtime – and no differently than the right to bargain collectively conferred by the NLRA. Substantive rights should not be construed narrowly.

not be covered by ordinary clothing, *id.* at 19; items worn on the extremities, *id.* at 19; and items employers are required to provide to employees under OSHA's personal protective equipment regulations, *id.* at 57. To implement this rule, courts would have to determine, item by item: How is the item used? For what purpose was the item designed? What materials were used in the construction of the item? Is that material "ordinary cloth"? Is the item worn over other clothes? Where on the body is the item worn?

The most workable definition of the word "clothes" in Section 3(o) – for employers, employees, unions, the DOL and the courts – is the definition most consistent with the text, context and purpose of Section 3(o): Any article that an employee wears on his or her person to be ready to work.

CONCLUSION

For the foregoing reasons, the decision of the Seventh Circuit should be affirmed.

Respectfully submitted,

KARIN F.R. MOORE
GROCERY MANUFACTURERS ASSOCIATION
1350 I Street, Suite 300
Washington, D.C. 20005

TAMMY D. MCCUTCHEN
Counsel of Record
WILLIAM F. ALLEN
STEVEN E. KAPLAN
SHERRON T. MCCLAIN
LITTLER MENDELSON, P.C.
1150 17th Street, N.W.
Suite 900
Washington D.C. 20036
(202) 414-6857
TMcCutchen@littler.com

Counsel for Amicus Curiae

July 26, 2013